Supreme Court, U.S.
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No. 01-278

IN THE

Supreme Court of the United States

MARK ABDU-BRISSON, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DELTA AIR LINES, INC.

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals properly affirm the district court's summary judgment dismissing Petitioners' age discrimination claims against Respondent Delta Air Lines, Inc. ("Delta") under the New York Human Rights Law, N.Y. Exec. Law § 296 (McKinney's 1993), and the New York City Human Rights Law, N.Y. City Admin. Code §§ 8-107 *et seq.*, where the conduct complained of was: (1) the manner in which Petitioners, who are a group of pilots formerly employed by Pan American World Airways, Inc. ("Pan Am") that Delta hired, were placed on Delta's pilot bidding seniority list pursuant to an agreement between Delta and its pilots' union, and (2) Delta's decision to raise Petitioners, along with all other Pan Am employees hired by Delta regardless of their age, to Delta's pay rates over a three-year period and not to credit their Pan Am service toward their eligibility for certain post-retirement medical benefits at Delta; where the district court found no prima facie case of age discrimination; and where the court of appeals found a "de minimis" prima facie case but found no evidence that the legitimate nondiscriminatory reasons for the challenged conduct were pretextual.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Delta Air Lines, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners, plaintiffs and appellants below, are 488 former Pan Am pilots (Captains and co-pilots) who were hired by Delta in 1991 in connection with Delta's purchase of certain Pan Am assets. Rather than placing Petitioners at the bottom of its pilots bidding seniority list upon their hiring, as Delta's then-existing collective bargaining agreement would have required, Delta negotiated an agreement with the union that represents Delta's pilots on a seniority integration methodology pursuant to which Petitioners were offered positions on the Delta pilots' seniority list that were slotted among those of existing Delta pilots. Delta also agreed to raise the pay of Petitioners, along with all Pan Am employees it hired, from their lower Pan Am rates to Delta's higher rates over a period of three years. Finally, Delta required Petitioners, like all other Pan Am employees it hired, to obtain ten years of service with Delta before becoming eligible for fully paid post-retirement medical benefits.

Although Petitioners accepted Delta's offers of employment and agreed to the bidding seniority positions made available pursuant to the agreement with Delta's existing pilots, three years later they filed this suit, claiming that Delta's failure to obtain for them more favorable pilot bidding seniority than it was able to negotiate with the pilots' union and failure to offer more favorable benefits constituted age discrimination in violation of New York State and New York City law. The district court granted summary judgment in favor of Delta, finding no prima facie case of age discrimination. The United States Court of Appeals for the Second Circuit affirmed this judgment, albeit on different grounds, finding a "de minimis" prima facie case but no evidence Delta's legitimate nondiscriminatory reasons for its conduct were pretextual. Petitioners now ask this Court to grant certiorari to review the lower courts' rulings on the issues of New York State and New York City law presented in this case.

This Court should deny Petitioners' request for a writ of certiorari not merely because the Second Circuit's decision was correct, but also because no legal issue worthy of the Court's certiorari review is presented by the petition. As a threshold matter, the petition requests this Court to pass judgment solely on a matter of state and municipal law. Furthermore, Petitioners' arguments are based upon the erroneous and unsupported assertion that the court of appeals, in looking to federal law for guidance in interpreting New York City and State law, improperly analyzed only whether Petitioners could show pretext through evidence that Delta's nondiscriminatory rationales for its actions were false, rather than allowing Petitioners to prove pretext through other means as well. The Second Circuit, however, did no such thing. The Second Circuit properly examined both whether Petitioners could show falsity, as well as whether the handwritten notes of a Delta employee to which Petitioners pointed as evidence of pretext could establish that Delta's stated rationales were a cover up or, as the Second Circuit put it, a "ruse," for age discrimination. There thus is no conflict between the Second Circuit's application of New York City and State law in this case and the well established analysis followed by federal courts interpreting the burdens of proof under federal age discrimination law.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioners' "Statement of the Case" (Pet. 3-7) is incomplete, and the factual assertions in their petition are a significant distortion of the record evidence. A more complete statement of the undisputed facts relevant to the petition is set forth below.

A. The Asset Purchase Agreement Between Delta and Pan Am

In January 1991, Pan Am filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. In July 1991, Pan Am and Delta entered into an Asset Purchase Agreement (the "APA"), pursuant to which Delta agreed to acquire certain equipment, route authority, and other assets from Pan Am. The APA was approved by the United States Bankruptcy Court for the Southern District of New York on August 12, 1991. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (Bankr. S.D.N.Y. 1994).

The APA provided that Delta would hire at least 6,600 Pan Am employees, including 700 Pan Am cockpit personnel, the approximate number required to operate the aircraft that Delta had agreed to acquire. The APA obligated Pan Am to "provide to [Delta] a list of all employees in order of seniority and by . . . classification," and it required Delta to offer employment to the Pan Am pilots (Captains and First Officers) and flight engineers (Second Officers) "in seniority order by category." The APA also provided that Delta could not offer employment to Pan Am's pilots and flight engineers unless and until Delta had reached an agreement with existing Delta pilots on the terms and conditions of employment that Delta would offer, including the methodology for placing the Pan Am pilots and flight engineers on the Delta pilots' bidding seniority list.

B. Creating Slots for Pan Am Pilots and Flight Engineers on the Delta Pilots' Seniority List

Absent an agreement with the existing Delta pilots to create positions for the Pan Am pilots and flight engineers

on the Delta pilots' seniority list, the collective bargaining agreement between Delta and the Delta pilots' union, the Air Line Pilots Association ("ALPA"), required that all of the Pan Am cockpit personnel hired by Delta be placed at the *bottom* of the pilot seniority list (like all new-hire pilots), *below all existing Delta pilots*. On August 30, 1991, Delta and ALPA agreed on a "modified status ratio methodology" that created slots for the Pan Am cockpit personnel on the Delta pilots' seniority list. The slots were spread throughout the Delta pilots' seniority list and generally corresponded to the cockpit jobs being created at Delta in connection with the asset acquisition. This methodology was set forth in a supplemental collective bargaining agreement between Delta and ALPA.

C. Delta's Hiring of Pan Am Pilots

Petitioners, and many other former Pan Am pilots, applied to Delta for employment as pilots (Captains and co-pilots). Delta offered Petitioners employment as pilots, along with positions (granted by the existing Delta pilots) on the Delta pilots' seniority list pursuant to the supplemental collective bargaining agreement that Delta had negotiated with ALPA. Each Petitioner accepted Delta's employment offer and began working for Delta as a pilot in the fall of 1991. Since Delta offered employment to the Pan Am pilots in their Pan Am seniority order, Delta hired a relatively senior group of pilots. The average age of the 690 Pan Am pilots (Captains and First Officers) hired by Delta was 50 (median age 52). However, their ages spanned from 27 to 59 (a federal regulation prohibits any person from occupying a Captain or First Officer position after the age of 60).[1]

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1. 14 C.F.R. § 121.383(c).

D. Petitioners' Claims in This Action

Petitioners, after having accepted Delta's offers of employment, sought through this action to force the original Delta pilots to give them more senior positions on the pilot bidding seniority list. Petitioners filed this action in New York state court on October 31, 1994, three years after the closing of the Pan Am Asset Purchase Agreement. Under the guise of an "age discrimination" theory, Petitioners sought to use New York State and New York City law to force an increase in their relative bidding seniority at the expense of the original Delta pilots.[2]

Petitioners do not complain about the order in which the slots created in the pilot seniority list were filled by Pan Am pilots. Since Delta offered Pan Am pilots placement in the newly created slots on the basis of their relative seniority on the Pan Am pilots' seniority list, older Pan Am pilots generally were favored by the manner in which the slots were filled. Thus, Petitioners are challenging only the creation of the slots themselves, claiming that the incumbent Delta pilots (who allegedly were, on average, younger) should have given up more of their contractually protected bidding seniority to the Pan Am pilots (who allegedly were, on average, older) than they did.

Petitioners also seek through this action increased pay and post-retirement medical insurance benefits from Delta. Most Pan Am employees, including Petitioners, were paid

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2. Petitioners initially filed suit in state court in New York, and Delta removed the case to federal court on the grounds that certain of Petitioners' claims were completely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*

significantly less than Delta employees, including Delta pilots. Delta offered employment to Petitioners and other Pan Am employees at their Pan Am pay rates with scheduled increases to parity with Delta's higher pay rates spread out over a period of three years. Pilots were treated the same as all other Pan Am employees of all ages in this respect.

As for Petitioners' claims regarding medical benefits, before the Pan Am asset acquisition was even contemplated, Delta had adopted a requirement that those employees who retired with less than ten years of Delta service had to pay a portion of the premiums for their post-retirement medical insurance coverage. Delta adopted this requirement in an effort to restrain the spiraling growth in the costs of its post-retirement medical benefits. No exemption was made for the former Pan Am employees, nor could their service at Pan Am be counted toward the ten-year required Delta service. Thus, under the policy at issue in this case, all former Pan Am employees, regardless of age, had to work for Delta for ten years before the company would pay the full cost of their post-retirement medical insurance coverage.

II. PROCEDURAL BACKGROUND

A. The District Court's Decision[3]

The district court granted Delta's summary judgment motion and dismissed Petitioners' state-law claims on the

3. Prior to the district court's decision on the merits of Petitioners' claims, the affirmance of which by the Second Circuit is at issue here, the district court granted Delta's motion to dismiss based on the preemption of Petitioners' claims by the Airline (Cont'd)

grounds that Petitioners had failed to satisfy their burden to present evidence on each element of their prima facie case of age discrimination. *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494(HB), 1999 WL 944505 (S.D.N.Y. Oct. 19, 1999). Specifically, the district court held that Petitioners were not "similarly situated" to the existing Delta pilots whose more favorable treatment on the Delta pilots' seniority lists Petitioners allege to be the result of age discrimination. *Id.* at *3-4. Thus, while Petitioners might have been treated less favorably because of their airline of origin, they failed to produce evidence sufficient to establish a prima facie case of discrimination in the creation of pilot bidding seniority slots for them. The district court rejected Petitioners' challenges to Delta's post-retirement medical benefits rules because Delta applied these same rules to all Pan Am employees it hired, regardless of their age, and thus the difference in treatment likewise was caused by Petitioners' airline of origin, and not by their age. *Id.* at *5. Similarly, the district court held that because Delta's three-year pay increase applied equally to former Pan Am employees of all ages, Petitioners could advance no age discrimination claims based on their pay. *Id.* at *5-6.

(Cont'd)
Deregulation Act ("ADA"), 49 U.S.C. § 41713. *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F. Supp. 109 (S.D.N.Y. 1996). The Second Circuit reversed the district court's ruling on ADA preemption, however, and remanded the case. *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2d Cir. 1997). On remand, the district court granted Delta's motion for summary judgment on the merits of Petitioners' claims. *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494(HB), 1999 WL 944505 (S.D.N.Y. Oct. 19, 1999).

B. The Second Circuit's Decision

Petitioners appealed the district court's dismissal of their age discrimination claims to the United States Court of Appeals for the Second Circuit. Looking to federal law for guidance, the Second Circuit disagreed with the district court's evaluation of Petitioners' prima facie case, holding that Petitioners "produced enough evidence to meet their *de minimis* burden of raising an inference of discriminatory intent by Delta." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001). The court, however, also held that Delta had set forth legitimate, nondiscriminatory explanations for Petitioners' positions on the pilot bidding seniority list, and for its requirements regarding post-retirement medical benefits and pay increases. Specifically, the court acknowledged the undisputed evidence that Petitioners' positions on the seniority list were due to the fact that Delta had to negotiate for slots from the existing Delta pilots, and that the modified status ratio methodology that was agreed upon was both reasonable and was approved by the pilots' union, ALPA. As for post-retirement medical benefits and pay increase issues, Delta's decisions were undisputed to be motivated by its desire to contain the costs of the otherwise expensive Pan Am asset acquisition. *Id.* at 469.

Turning to Petitioners' obligation to demonstrate evidence that these asserted justifications were pretextual, the Second Circuit observed that, following this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), the inquiry under the ADEA remains whether Petitioners were able to "make a showing that [Delta's] proffered explanations were pretextual." *Abdu-Brisson*, 239 F.3d at 470. The court found that

Petitioners had advanced no evidence of pretext sufficient to withstand summary judgment, and thus affirmed the judgment in Delta's favor. *Id.* The court subsequently denied Petitioners' motion for rehearing and suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to determine whether the United States Court of Appeals for the Second Circuit correctly affirmed the district court's grant of summary judgment to Delta on Petitioner's age discrimination claims under a New York statute and the New York City administrative code. This case does not involve claims under the ADEA or another federal statute, however, and the Second Circuit's decision is entirely consistent with the New York courts' interpretation of the state statute and city code provisions at issue here. Thus, this is not an "exceptional case" that warrants this Court's review of a decision based solely on state law, and the petition for certiorari should be denied on these grounds alone.

Moreover, even if this Court were to consider the merits of the court of appeals' ruling on the state-law issue presented here, the petition should be denied. Petitioners' argument that the Second Circuit's analysis of federal law reveals a circuit conflict regarding whether a showing of pretext necessarily involves a showing of falsity, or whether pretext instead may be shown by other forms of evidence, is incorrect. The Second Circuit fully analyzed Petitioners' efforts to muster sufficient evidence of pretext to overcome summary judgment, considering both whether Delta's explanations were false as well as whether any evidence existed that otherwise demonstrated that Delta's proffered justifications were pretextual.

Petitioners presented no evidence that Delta's asserted justifications were false, however, and merely pointed to the same evidence that the Second Circuit found barely sufficient to meet the "de minimis" showing of a prima facie case of age discrimination as their evidence of pretext as well. The Second Circuit scrutinized Petitioners' evidence, but found it insufficient to demonstrate pretext because it failed to create an issue of fact that would allow a rational jury to find that Delta's articulated explanations were a "ruse" for age discrimination. Far from calling on this Court to resolve a purported circuit conflict, Petitioners actually ask the Court to interpret the requirements of New York State and City law differently than the Second Circuit did, and to reach a different conclusion than that court as to whether the evidence offered by Petitioners on the issue of pretext was sufficient for their claims to go to trial. Their request for certiorari review of the Second Circuit's decision accordingly should be denied.

I. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SOLELY INVOLVES QUESTIONS OF STATE LAW, AND DOES NOT PRESENT AN "EXTRAORDINARY CASE" THAT WARRANTS THIS COURT'S REVIEW OF SUCH ISSUES.

Petitioners have not asserted any age discrimination claims against Delta under the federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"). Instead, as they concede, Petitioners have asserted age discrimination claims solely under New York State and City law. *See* New York State Human Rights Law, N.Y. Exec. Law § 296 (McKinney's 1993) ("State HRL");

New York City Human Rights Law, N.Y. City Admin Code §§ 8-107 *et seq.* ("City HRL"). *See* Pet. for Cert., at 5 n.3.[4]

This Court repeatedly has admonished that it will "not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996); *see also id.* at 146 ("It is contrary to our settled practice to grant a petition for certiorari for the sole purpose of deciding a state-law question ruled upon by a federal court of appeals.") (Stevens, J., dissenting); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review."); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case.").[5]

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4. Petitioners nonetheless assert that "the Second Circuit decided this case under federal law," apparently arguing this to be the case because the State HRL and City HRL generally look to federal law for guidance and follow the same burden of proof as the ADEA. *Id.* at 8 n.8. This is simply incorrect. The Second Circuit's decision was grounded in New York State and New York City law, as its own opinion recognized. *See Abdu-Brisson*, 239 F.3d at 465. Accordingly, if this Court were to grant certiorari in this case and decide the issues that Petitioners ask it to consider, this Court would be rendering a decision solely on matters of New York law — a decision that would be binding neither on federal courts applying federal discrimination statutes such as the ADEA, nor on New York courts applying the State HRL and City HRL, but only on federal courts interpreting New York State and City law.

5. The rarity of granting such petitions is underscored by this Court's 1980 deletion of a portion of its own rule that specifically

(Cont'd)

This Court noted in *Leavitt* that the grant of a petition for certiorari "solely to review what purports to be an application of state law" is appropriate where "the alternative is allowing blatant federal court nullification of state law." *Leavitt*, 518 U.S. at 144-45. Here, however, there is no danger of such "blatant federal court nullification." The Second Circuit's holding that summary judgment was appropriate because Petitioners failed to offer any evidence that Delta's legitimate explanations for its actions were a pretext for age discrimination is entirely consistent with the New York courts' interpretation of the State HRL and the City HRL. The New York courts, like the Second Circuit, have analyzed the issue of pretext by looking to whether a plaintiff alleging discrimination can bring forth evidence that the employer's explanation was false. *See, e.g.*, *Ferrante v. Am. Lung Assoc.*, 687 N.E.2d 1308, 1311 (N.Y. 1997) (noting that discrimination plaintiff suing under State HRL may "prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination" by showing " 'that the reason was false' "); *Hardy v. Gen. Elec. Co.*, 705 N.Y.S.2d 97, 101 (N.Y. App. Div.) (same), *appeal denied*, 739 N.E.2d 295 (N.Y. 2000).

Thus, far from blatantly nullifying the State HRL and the City HRL, the Second Circuit's holding is consistent with the New York courts' prior interpretations of these laws.

(Cont'd)
included as grounds for certiorari review a decision of " 'a court of appeals [that] has . . . decided an important state or territorial question in a way in conflict with applicable state or territorial law.' " *Leavitt*, 518 U.S. at 147 (comparing S. Ct. R. 19(1)(b) (1970) with S. Ct. R. 17.1 (1980)) (Stevens, J., dissenting). In this Court's current rules, this specific basis for certiorari review remains absent. *See* S. Ct. R. 10.

Accordingly, this is not the "extraordinary case" that warrants this Court's exceedingly rare invocation of certiorari jurisdiction to review a court of appeals' decision on solely a state-law matter.

II. THE SECOND CIRCUIT FULLY AND APPROPRIATELY ANALYZED PETITIONERS' ARGUMENTS REGARDING PRETEXT.

Even if this Court were inclined to address the appropriate standard to be used in analyzing evidence of pretext in age discrimination claims asserted under New York law, certiorari should be denied because the question that Petitioners claim is presented for review is not actually presented in the petition. The issue that Petitioners claim is presented here is merely one of semantics — whether the Second Circuit's use of the word "false" several times in its opinion means that the court operated on the premise that pretext always requires a showing of falsity. In other words, did the Second Circuit believe that evidence of falsity is coextensive with evidence of pretext, or did the court view it instead merely as a subset of evidence that can be used to prove pretext?

Petitioners contend that the former is true, and that the court of appeals failed to consider other ways in which they claim they could have established that Delta's asserted justifications for its actions were a pretext for age discrimination. When the opinion below is reviewed in full, however, it is clear that the Second Circuit actually followed the latter view, and considered all of the evidence that Petitioners offered — including the evidence they claim was ignored — irrespective of the terminology that the court employed in its opinion.

A. The *McDonnell Douglas* Burden-Shifting Framework.

Petitioners' argument rests on the last prong of the three-part burden-shifting method of proof in discrimination cases that this Court first adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for cases arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, in which the plaintiff seeks to establish his or her case solely through circumstantial evidence of discrimination.[6]

First, the plaintiff must establish a prima facie case of discrimination. *See Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). After the prima facie case is made, the burden shifts to the defendant to "set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). "This burden is one of production, not persuasion; it can involve no credibility assessment." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 509).

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6. In contrast to cases involving circumstantial evidence such as this one, another way to prove discrimination is through the use of direct evidence of discrimination. Direct evidence is evidence which, if believed, would prove without inference or presumption that the affected employees were discriminated against. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990). There is no direct evidence that any of the challenged conduct in this case is the result of age discrimination. Accordingly, this case solely involves alleged circumstantial evidence of discrimination.

Once this burden is met, " 'the *McDonnell Douglas* framework — with its presumptions and burdens' — disappear[s], . . . and the sole remaining issue [i]s 'discrimination *vel non*.' " *Id.* at 142-43 (citations omitted). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. To satisfy this burden, the plaintiff may "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 248. "That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.' " *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 256).

B. The Second Circuit Properly Considered Whether Petitioners Could Introduce Evidence That Delta's Asserted Nondiscriminatory Reasons for its Actions Were False in Determining Whether Petitioners Could Avoid Summary Judgment on the Issue of Pretext.

That the Second Circuit inquired as to whether Petitioners could demonstrate that Delta's explanations for its actions were false is not, by itself, inappropriate. This Court's own decisions in the Title VII and ADEA arenas recognize that a showing of falsity often is a persuasive way to demonstrate pretext. *See St. Mary's Honor Ctr.*, 509 U.S. at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."); *see also Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of

circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

Moreover, as Petitioners concede, this Court frequently has used the words "false" or "falsity" in discussing a discrimination plaintiff's obligation to produce sufficient evidence of pretext to survive summary judgment. For example, in *Reeves*, the Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is *false*, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148 (emphasis added). *See also id.* at 144 (analyzing petitioner's evidence of pretext, and stating that "Petitioner, however, made a substantial showing that respondent's explanation was false") and 147 ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."); *St. Mary's Honor Ctr.*, 509 U.S. at 515 ("But a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.") (emphasis omitted).

Thus, this Court expressly has recognized that evidence of the falsity of the employer's reason for its actions is relevant to show pretext, and the Second Circuit therefore did not err in measuring Petitioners' evidence against this standard. Nor did the Second Circuit err in finding that Petitioners lacked any evidence that Delta's proffered explanations were false. Nothing in the record before that court, or the district court, undermined the validity of Delta's justifications that it integrated Petitioners into the pilot bidding seniority list in the fashion it did because ALPA was willing to agree to these slots, or that it imposed the

rules concerning post-retirement medical benefits and pay increases at issue here to minimize the costs of the acquisition of Pan Am assets. The Second Circuit's consideration of Petitioners' inability to produce any evidence of the falsity of Delta's nondiscriminatory reasons for its actions therefore was proper.

C. The Second Circuit Also Properly Considered Whether, Even if Delta's Asserted Explanations Were True, Petitioners Nonetheless Could Establish Evidence of Pretext Through Some Other Means.

The linchpin of Petitioners' argument is the assumption that the Second Circuit considered *only* whether they could introduce evidence that Delta's explanations for the employment actions at issue were factually false, *i.e.*, that ALPA would have agreed to greater seniority for the former Pan Am pilots, or that providing greater post-retirement medical benefits and increased pay sooner was not based on the costs of these measures. As noted above, the Second Circuit did analyze these matters, and properly found evidence of falsity to be lacking. *Abdu-Brisson*, 239 F.3d at 470. But that is not all it considered.

The Second Circuit also discussed whether Delta's asserted justifications, even if factually true, were nonetheless not the real reason for its actions, with the real reason being age discrimination. For example, the court noted that, once an employer has met its burden of production by asserting nondiscriminatory reasons for its actions, "the burden shifts back to the plaintiff to come forward with evidence that the employer's proffered explanations were merely pretextual and that the actual motivations more likely than not were discriminatory." *Id.* at 469. The Second Circuit

also observed that "*Reeves* in no way relaxed the requirement that plaintiffs make a showing that the defendant's proffered explanations were pretextual." *Id.* at 470. Thus, the court properly recognized that the ultimate issue was whether Petitioners could demonstrate evidence of pretext, such that the trier of fact could reasonably conclude that Delta's true motivation was age discrimination.

One way to demonstrate pretext, consistent with *Reeves*, would be through evidence of falsity, *i.e.*, evidence that Delta's asserted reasons for its actions were factually wrong. Correctly finding that Petitioners lacked any such evidence, the Second Circuit turned to the purported evidence of pretext offered by Petitioners — the handwritten notes of Captain Harry C. Alger, Delta's then-Vice President of Flight Operations — which, the court aptly observed, "are not only the centerpiece, but the entirety of [Petitioners'] case." *Id.* at 470. The court held, however, that these notes "are not sufficient to establish that Delta's stated financial rationale was a ruse" for age discrimination. *Id.* In other words, the court held that Captain Alger's notes were insufficient to create a genuine issue of material fact as to whether Delta's asserted explanations for its pay and benefits decisions, even if factually true, nonetheless were a cover-up (or a "ruse") for its true motivation of age discrimination.

The court thus considered, and rejected, the very evidence that Petitioners claim it ignored. In their petition to this Court, Petitioners point only to Captain Alger's notes in support of their contention that they could have established pretext without undermining the factual correctness of Delta's reasons for its actions. *See* Pet. for Cert., at 14 ("Plaintiffs in this case presented clear evidence that the adverse employment actions were motivated by Delta's intent

to discriminate against them because of their age. Included in that evidence were derogatory comments made by Delta management about plaintiffs' ages."). The Second Circuit considered this evidence, but held that it fails to establish any inference of discrimination in this case, just as it had held in past cases brought by former Pan Am employees against Delta.

Specifically, Captain Alger's notes were found by the United States Court of Appeals for the Second Circuit to be inadequate to defeat summary judgment in *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (per curiam), which was an age discrimination claim filed by a purported class of Pan Am pilots who were 55 years of age and older and were *not* hired by Delta in connection with the 1991 asset acquisition. Those same notes, moreover, were also found to be inadequate to defeat summary judgment in *Adams v. Delta Air Lines, Inc.*, No. 96-CIV-2871(HB), 1997 WL 620823 (S.D.N.Y. Oct. 8, 1997), *aff'd*, 175 F.3d 1007 (2d Cir.), *cert. denied*, 528 U.S. 877 (1999), which was an age discrimination claim filed by 71 former Pan Am flight engineers who challenged where they were placed on the Delta pilots' seniority list, which was *below* all of the Pan Am pilots (Captains and co-pilots) on the Delta list.

Petitioners' exclusive reliance on these notes in an attempt to show age discrimination makes even less sense in this case. The notes had nothing to do with the bidding seniority positions granted by the existing Delta pilots. All Petitioners were hired by Delta, and the seniority placement itself actually favored older Pan Am pilots over younger Pan Am pilots since the Delta pilot seniority slots were filled by the Pan Am pilots in their Pan Am seniority order. Furthermore, there was no evidence presented in this case

that Captain Alger had any involvement in Delta's decisions to require Petitioners, and all other Pan Am employees it hired, to obtain ten years of service before becoming eligible for fully-funded post-retirement medical benefits, or to wait three years before their pay would be raised fully from the lower Pan Am rates to the higher Delta rates. Instead, Captain Alger's notes reflect nothing more than stray remarks from a preliminary fact-finding investigation regarding the Pan Am workforce, after which a deal was struck in a way favorable to the oldest of the Pan Am pilots, whose ranks include Petitioners. By holding that these notes failed to raise any inference of pretext sufficient to overcome summary judgment, the Second Circuit properly acknowledged these realities.

Therefore, the issue that the petition claims is presented for this Court's review is not actually presented in this case. What Petitioners really ask this Court to do is to reweigh the evidence in the record and reach a contrary conclusion from that of the Second Circuit as to the effect of Captain Alger's notes on their ability to have their claims submitted to a jury on the issue of pretext. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). It accordingly should decline Petitioner's invitation to conduct such a review in this case.

D. This Court Should Not Grant the Petition Because the Judgment in This Case Also Can Be Affirmed Based on the Trial Court's Opinion.

Another reason counseling against this Court's acceptance of certiorari review in this case is that the judgment also can be affirmed based on the rationale of the

district court. Specifically, the district court held that Petitioners had not set forth evidence of a prima facie case of age discrimination with regard to their placement on the Delta pilots bidding seniority list because there was no evidence any difference in treatment was caused by their age rather than by their airline of origin. *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494(HB), 1999 WL 944505, at *4 (S.D.N.Y. Oct. 19, 1999). Similarly, because it is undisputed that the restrictions regarding pay increases and post-retirement medical benefits at issue here applied equally to all Pan Am employees that Delta hired, regardless of their ages or pilot status, Petitioners could not show that Delta's imposition of these restrictions on them could be caused by age discrimination. *Id.* at *5-6.

As the district court's opinion confirms, this case involves differences in treatment of individuals who are not similarly situated and fails to present evidence sufficient to establish a prima facie case. Because the judgment in Delta's favor in this case thus could be affirmed based either on the district court's or the court of appeals' opinions, this Court ought not to grant certiorari to review the court of appeals' decision.

E. There Is No Circuit Conflict That Warrants This Court's Intervention.

Petitioners attempt to concoct a purported circuit conflict between the Second Circuit's opinion in this case and the opinion of the United States Court of Appeals for the Seventh Circuit in *Golomb v. Prudential Ins. Co. of Am.*, 688 F.2d 547 (7th Cir. 1982). There is no actual conflict with *Golomb*, however, because the Second Circuit considered not only whether Petitioners had set forth evidence of falsity, but also

whether they had offered any evidence that Delta's asserted justifications, even if factually true, were a cover up for its true motivation of age discrimination and thus sufficient evidence of pretext to overcome summary judgment.

In *Golomb*, which arose under the ADEA (in contrast to Petitioners' state-law claims), the plaintiff Golomb lost a jury trial, and appealed from the denial of his motion for a new trial. The basis for Golomb's appeal was the trial court's use of the word "pretext" in the jury instructions, which Golomb contended misstated his burden of proof because he believed the jury would assume that the word "pretext" means "false." The Seventh Circuit agreed with Golomb that "a claimant in an age discrimination suit need not prove that the employer's articulated reason was false," and need only show that "age was . . . a determining factor in the employer's decision." *Id.* at 551. The court, however, rejected Golomb's argument that "pretext" would mean "false" to the average juror based on the dictionary definition of this term, and upheld the trial court's jury instructions. *Id.* at 552.

Golomb thus stands only for the unremarkable proposition that evidence of falsity is not necessarily the only way to demonstrate pretext. The Second Circuit applied this same standard in this case, searching the record for evidence that Delta's asserted justifications were false and, finding none, also hunting for evidence that Delta's asserted explanations, even if factually true, were only a cover up — or, in the Second Circuit's words, a "ruse" — for its true motivation of age discrimination. *Abdu-Brisson*, 239 F.3d at 470. The only evidence that Petitioners offered on this point (or any other) was Captain Alger's notes, which the Second Circuit found insufficient to create a genuine issue of material fact as to pretext.

Thus, the Second Circuit's opinion in this case is entirely consistent with the Seventh Circuit's opinion in *Golomb*. Both cases recognize that, while evidence of the falsity of an employer's explanation can constitute evidence of pretext, falsity is not necessarily the only way to demonstrate pretext. There accordingly is no circuit conflict that would justify this Court's grant of the petition for certiorari in this case.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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